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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 18

UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL DAIRY PRODUCTS CORPORATION

and

RAYMOND J. WISE, an individual, *Appellees*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

PETITION OF APPELLEES FOR REHEARING

JOHN T. CHADWELL
RICHARD W. McLAREN
JAMES A. RAHL
JEAN ENGSTROM
135 South LaSalle Street
Chicago 3, Illinois

Of Counsel:
CHADWELL, KECK, KAYSER,
RUGGLES & McLAREN

MARTIN J. PURCELL
1701 Bryant Building
Kansas City 6, Missouri

Of Counsel:
MORRISON, HECKER, BUCK & COZAD

JOHN H. LASHLY
705 Olive Street
St. Louis 1, Missouri

Of Counsel:
LASHLY, LASHLY & MILLER

Attorneys for Appellees

Dated: March 13, 1963

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The Court reversed the trial court on February 18, 1963, holding that the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act is not unconstitutionally vague (__ U.S. __, 83 S. Ct. 594). Three Justices joined in a dissenting opinion. Appellees respectfully petition for a rehearing.

I. THE MAJORITY OPINION JEOPARDIZES PRICE COMPETITION AND THE RIGHT TO BE SECURE FROM VAGUE CRIMINAL ENACTMENTS.

The opinion of the majority tolerates major ambiguities in the statute on questions which are crucial to price competition. The opinion states that the Court need not be con-

cerned with vagueness and uncertainty as to the meaning of this statute, except as the statute is applied in the indictment in this case, because the prohibition is not directed at any "socially desirable" activity (83 S. Ct. 600). But the statute directly inhibits price competition, and requires all to observe a legal line between price competition made criminal, and price competition which is not only lawful, but highly desirable. The confusion into which price competition may thereby be thrown can be shown from the opinion in two ways.

1. The majority holds that selling below cost constitutes selling at "unreasonably low prices." At the same time it necessarily holds that not all sales below cost are at "unreasonably low prices" (83 S. Ct. 600). Selling below cost, the opinion states, is not unreasonable when "mitigated by some acceptable business exigency" (*id.* at 598), or when "made in furtherance of a legitimate commercial objective" (*id.* at 600).

How can anyone know in advance which of the many possible commercial objectives will qualify as "acceptable" or "legitimate"—terms which are as ambiguous as the term, "unreasonably low"? The majority opinion refers only to a few examples, "*such as* the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor" (*ibid.*; italics added). The Government's brief admitted six or seven types of legitimate sales below cost, and we assume that the Court would accept at least those (G.B.R. 41-42).* Our own brief

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* The Brief for the United States on Reargument is referred to herein as "G.B.R.", the Brief for Appellees on Reargument as "A.B.R.," and the printed Transcript of Record as "R."

suggested 14 types which we think the Court would endorse (A.B.R. 35-36). The point is that there is no reliable guide for sellers as to where such a list will end, because the statute contains no standard for what is or is not "unreasonably low." Nor does the separate "purpose" phrase of the statute supply the missing meaning. As the opinion recognizes, the statute contains two elements, "unreasonably low prices," and illegal "purpose," and one cannot be used to define the other without reading one of them out of the statute as it was drawn by Congress. (G.B.R. 11, 18; A.B.R. 11-13.)

This dilemma of lack of equivalence between "sales below cost" and "unreasonably low prices" can be straightened out satisfactorily only by Congress, as the dissenting opinion states (83 S. Ct. 600).

2. The majority opinion is unable to decide whether its own adopted test of "below cost" means below "direct" cost, "fully distributed" cost, or "some other level of cost computation" (83 S. Ct. 599). It states that this may well be an "academic" question in the instant case (*ibid.*). But if "below cost" is to have the decisive criminal importance given it by this opinion, the failure to decide what is meant by "cost," as well as how it is to be determined, and the other difficult questions which cannot be avoided by anyone who must apply a "cost" test (A.B.R. 39-54), is a matter of the utmost constitutional gravity.

Appellees are told that they are not to know until *after* the trial is over what the decisive standard of illegality is. This would appear to violate their rights under the Sixth Amendment. Moreover, all sellers who seek to compete in

price and at the same time to abide by this Court's ruling are left without the crucial cost definition which they must have.

In the many situations involving effective price competition, may not sellers conclude that the Court has made day-to-day price competition legally unsafe, and non-price competition the only secure course?

A "socially desirable" activity is surely endangered (*cf.* 83 S. Ct. 600). No argument to this Court is required to show that the maintenance of free price competition has always been regarded as indispensable to the antitrust goals desired by Congress (A.B.R. 26, 58, 70). *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n. 59 (1940); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).

The further statement that this statute's vagueness endangers no "constitutionally protected" right, in contrast to cases involving First Amendment freedoms (83 S. Ct. 599-600), imperils not only the price competition policy of Congress, but the constitutional right of all persons to be protected in all phases of their lives against the oppression of vague criminal enactments. The modern "void for vagueness" doctrine was developed by the Court in cases of largely economic origin (see A.B.R. 55). Is not the threat to the liberty of all within the scope of a vague criminal statute in itself a constitutional problem of sufficient gravity to invoke the Court's constitutional conscience, without the necessity of finding yet a second constitutional problem?

The majority opinion states that the history of Section 3 supports the construction adopted by it (83 S. Ct. 598). Unfortunately, the Court has thus accepted some wholly

unsupported historical assertions of the Government (*cf.* A.B.R. 13-22). But the Court certainly will agree that there is no basis in history for thinking that Congress intended the "unreasonably low prices" clause to be turned into a menace to vigorous price competition. Nor does history invite reversal of the tradition of protecting all persons, whatever their economic station, against the menace to liberty of vague criminal enactments, which can come as easily from economic as from other kinds of law.

II. THE OPINION HAS INCORRECTLY ASSUMED THAT THE INDICTMENT ALLEGES CONDUCT WHICH APPELLEES SHOULD HAVE KNOWN WOULD BE A VIOLATION.

In concluding that the statute is clear enough, at least as "applied" in this case, the majority may have confused the actual indictment with hypothetical cases of very extreme below-cost sales posed from the bench during the oral argument. Actually, the indictment does not allege conduct which appellees should have known would be a violation of this provision. This is especially clear in light of the Court's test of whether the sales below cost are for a "legitimate commercial objective." The Court treats the indictment as if it charged (in the words of the opinion), "sales below cost without legitimate commercial objective and with specific intent to destroy competition" (83 S. Ct. 600). But the indictment alleges no objectives whatever on appellees' part. In the first paragraphs of the relevant allegations, it charges only in the language of the statute. In the second paragraphs, it charges that National used advantages possessed by it "to finance and subsidize a price war against

small dairies selling milk in competition with it . . . by intentionally selling milk to its distributor . . . at prices below National's cost" (*e.g.* R. 9).

The term, "price war," only signifies a given market condition. Merely participating in a "price war" is certainly not illegitimate, and the Robinson-Patman Act does not seek to make it so. As this Court recently stated in another Robinson-Patman Act case, "Such price warfare appears to be caused by a number of basic factors . . ."; and "[w]hatever we do here can neither eliminate nor mitigate the major economic forces which are productive of these price wars." *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 525 (1963).

Further, the charge that National "financed" a price war plainly alleges no more than that National engaged in it, since all sellers in the market necessarily "financed" their part in the "price war." The indictment does not allege how the "price war" began or ended, why it occurred, or that National was in any way responsible for it. If required to go to trial, appellees will show that they did not initiate a price war and that such price reductions as were made by National were defensive (R. 37-40). It may well appear also that other dairies including "small dairies" brought about the price war. The allegations of the indictment are thus consistent with what the Court would treat as "legitimate commercial objectives" on the part of National, and the indictment thus does not allege conduct which appellees should have known would violate the statute.

Moreover, as to the individual appellee, Raymond J. Wise, the statute cannot be sustained by reliance upon sales

below cost allegations, because he is not unequivocally charged with such sales. In the only Robinson-Patman count against him (Count 13, R. 28), he is not named either directly or indirectly in the sales-below-cost paragraph (par. 93, R. 29), and he is charged *only* in the language of the statute (par. 92, R. 28). In fact, the indictment underscores its lack of an unconditional charge of sales below cost against Wise by alleging in the general paragraph describing him that he "authorized or ordered to be done *some or all* of the acts alleged" against National (par. 91, R. 28; italics added).

Whether viewed "on its face," or "as applied," critical vagueness in the "unreasonably low prices" clause is thus disclosed and is left unsolved.

Accordingly, we ask that a rehearing be granted.

Respectfully submitted,

JOHN T. CHADWELL
RICHARD W. MCLAREN
JAMES A. RAHL
JEAN ENGSTROM
135 South LaSalle Street
Chicago 3, Illinois

Of Counsel:

CHADWELL, KECK, KAYSER, RUGGLES, & MCLAREN

MARTIN J. PURCELL
1701 Bryant Building
Kansas City 6, Missouri

Of Counsel:

MORRISON, HECKER, BUCK & COZAD

JOHN H. LASHLY
705 Olive Street
St. Louis 1, Missouri

Of Counsel:

LASHLY, LASHLY & MILLER
Attorneys for Appellees

Dated: March 13, 1963

CERTIFICATE OF COUNSEL

I, John T. Chadwell, counsel for appellees and a member of the Bar of this Court, certify that the foregoing petition for rehearing is presented in good faith and not for delay.

/s/

March 13, 1963